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IN THE

Supreme Court of the United States

October Term, A. D. 1956

STATES OF WISCONSIN, MINNESOTA, OHIO and PENNSYLVANIA,
Complainants,

v.

STATE OF ILLINOIS and the SANITARY DISTRICT OF CHICAGO,
Defendants.

No. 2 Original

STATE OF MICHIGAN,
Complainant,

v.

STATE OF ILLINOIS and the SANITARY DISTRICT OF CHICAGO, *et al.*,
Defendants.

STATES OF MISSOURI, KENTUCKY, TENNESSEE, LOUISIANA, MISSISSIPPI and ARKANSAS,
Intervening Defendants.

No. 3 Original

STATE OF NEW YORK,
Complainant,

v.

STATE OF ILLINOIS and the SANITARY DISTRICT OF CHICAGO, *et al.*,
Defendants.

No. 4 Original

MOTION OF THE STATE OF MICHIGAN, COMPLAINANT, FOR DISMISSAL OF THE MOTION OF THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO (FORMERLY THE SANITARY DISTRICT OF CHICAGO), DEFENDANT, FOR CLARIFICATION OF THE DECREE OF APRIL 21, 1930, OR, IN THE ALTERNATIVE, FOR APPOINTMENT OF AND REFERENCE TO A SPECIAL MASTER.

Thomas M. Kavanagh
Attorney General of the State of Michigan

By Edmund E. Shepherd
Solicitor General

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SPEAKER-HINES AND THOMAS, INC., STATE PRINTERS, LANSING, MICH.—1956

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To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

The State of Michigan, complainant in Original Cause No. 3, by Thomas M. Kavanagh, its Attorney General and Edmund E. Shepherd, its Solicitor General, presents this motion for dismissal of the motion of the Metropolitan Sanitary District of Greater Chicago (formerly the Sanitary District of Chicago), defendant, for clarification of the decree of April 21, 1930, or, in the alternative, for the appointment of a Special Master and the reference to him for hearing and report on the issues raised by the motion of the Metropolitan Sanitary District.

The motion to dismiss the motion of the Metropolitan Sanitary District is made on the grounds that:

1. There is no need for clarification of the decree of April 21, 1930.

2. The State of Illinois has petitioned this Court for temporary modification of Paragraph 3 of the Decree of April 21, 1930, and its petition does not ask or evince any need for clarification as distinguished from modification of that decree.

3. The Metropolitan Sanitary District has failed to show cause for modification on its behalf of the decree of April 21, 1930.

4. The Metropolitan Sanitary District lacks capacity to seek clarification or modification of the decree of April 21, 1930 with respect to matters concerning navigation.

5. The Metropolitan Sanitary District has not shown that it and the interests it purports to represent are not adequately represented by the State of Illinois.

6. The State of Illinois in its soverign capacity and as *parens patriae* is the only party defendant authorized to seek relief due to the temporary emergency condition in respect to navigation as set forth in its aforestated petition.

7. The Metropolitan Sanitary District has no standing to speak for or to seek additional powers or jurisdiction on behalf of the Congress of the United States, the Secretary of the Army or the Chief of Engineers, United States Army.

8. The Metropolitan Sanitary District is not entitled to the declaratory relief sought by its motion so long as the treaty of January 11, 1909 with Great Britain remains in effect. In *Sanitary District* v. *United States*, 266 U. S. 405, 426, this Court held, in part, that the aforesaid Treaty "expressly provides against uses 'affecting the natural level or flow of boundary waters' without the authority of the United States or the Dominion of Canada within their respective jurisdictions and the approval of the International Joint Commission"; that withdrawal of water from Lake Michigan at the rate of ten thousand cubic feet per second will affect the level or flow of boundary waters, and that "that is a matter which cannot be done without the consent of the United States, even were there no international covenant in the case."

9. The procedure adopted by the Metropolitan Sanitary District of making its answer to the aforesaid petition of the State of Illinois the vehicle of a motion to clarify the decree of April 21, 1930 is not sanctioned by the rules of this Court, would deny to the other parties to the above-entitled original causes sufficient time within which to oppose the motion, and can serve only to delay a determination of the application of the State of Illinois, which would be contrary to the stated desires of all the other parties and to the needs of the situation.

The alternative motion for the appointment of a Special Master and the reference to him for hearing and report of the issues raised by the motion of the Metropolitan Sanitary District is made on the grounds that:

(a) If the motion of the Metropolitan Sanitary District is not dismissed for the reasons above-stated, the motion presents complicated questions of fact and of law.

(b) The motion of the Metropolitan Sanitary District has for its ultimate purpose nullification of the decree of April 21, 1930.

(c) Since the Decree of April 21, 1930 the following actions, among others, have been taken in reliance thereon:

(1) The Legislature of the State of New York has enacted the Power Authority Act creating the Power Authority of the State of New York as a corporate municipal instrumentality of the State, and directing it to effectuate the declared policy of the State of New York to develop the inalienable natural resources of the State in the St. Lawrence and Niagara Rivers for commerce and navigation

and for hydroelectric power. (Laws of 1931, Chapter 772, as amended; Public Authorities Law § 1000, *et seq.*)

(2) The governments of the United States and Canada submitted to the International Joint Commission established under the 1909 Treaty applications for its approval of the construction jointly by entities to be designated by the respective governments of certain works for the development of power in the International Rapids section of the St. Lawrence River. (U. S. Dept. of State Bulletin, Vol. 27, Dec. 29, 1952, pp. 1019-1024.)

(3) The International Joint Commission issued an order approving the construction of the aforesaid power works. (id; St. Lawrence Seaway Manual, Sen. Doc. No. 165, 83rd Cong. 2nd Sess.)

(4) The Federal Power Commission issued to the New York Power Authority a license under Section 4-e of the Federal Power Act for the construction, operation and maintenance of certain power facilities in the International Rapids section of the St. Lawrence River. (Op. No. 255 of the Federal Power Commission.)

(5) The President of the United States, by executive order, declared the New York Power Authority to be the designee of the government of the United States of America for the construction of the works referred to in the order of approval of the International Joint Commission. (18 Fed. Reg. 7005, Nov. 6, 1953.)

(6) The New York Power Authority has issued bonds in the sum of $335,000,000, backed by revenue

to be derived from the sale of power and not by public credit, to finance its share of the construction of the aforsesaid power works in conjunction with the designee of the Canadian government, Hydroelectric Power Commission of Ontario.

(7) The designees of the governments of the United States and Canada are now in the process of completing the aforesaid power works.

(8) The New York Power Authority is now in the process of contracting for the sale of all the power that can be generated by its part of such works and the rates for the sale of such power have been initially fixed on the basis of anticipated power generation resulting from the stream flow as fixed by the Decree of April 21, 1930.

(9) By Act of Congress there was created the St. Lawrence Seaway Development Corporation with authority to construct in United States territory deep water navigation works substantially in accordance with the "Controlled single stage project 238-242" set forth in the report of the Canadian Temporary Great Lakes-St. Lawrence Basin Committee and the United States St. Lawrence Advisory Committee. (Public Law 358, 83rd Cong.)

(10) The Seaway Corporation is now engaged in constructing the aforesaid deep water navigation works, and the canals, locks and channel improvement it is making are based upon the historical stream flow.

(11) The United States and Canada signed on February 27, 1950 and put into effect a Treaty Concerning the Uses of the Waters of the Niagara

River, which terminated the provisions of the 1909 Treaty only in respect to the waters of the Niagara River, provided for the construction of certain remedial works in the Niagara River to preserve and enhance the beauty of Niagara Falls, specified the amount of water to flow over the Falls for scenic purposes and the amount of water that might be diverted from the River for power purposes, stated that the waters available for power purposes should be divided equally between the United States and Canada, that representatives be designated to determine the amount of water available for purposes of the Treaty, and that until such time as there are facilities in the territory of one party to use its full share of the diversion waters for power purposes, the other party may use the portion of that share for use of which facilities are not available. (T I A S 2130.)

(12) Canada is completing construction on its side of the Niagara River of new facilities, by the use of which together with some old facilities, which it will ultimately abandon, it is using its share and part of the United States' share of the waters made available for power purposes pursuant to the terms of the 1950 Treaty. When its new facilities are completed, it will be able to use its and the United States' full share of the waters of the Niagara River until facilities are available for use in United States of the United States' share of the waters.

(d) The motion of the Metropolitan Sanitary District for clarification of the Decree of April 21, 1930 is not its first effort to secure judicial or congressional sanction for an increase in the diversion of waters from Lake Michigan. To date, both this Court

and the Congress have refused to deprive other users of such waters in Canada and the United States of their rights, except to meet a temporary critical emergency. See *Sanitary District of Chicago* v. *United States*, 266 U. S. 405; *Wisconsin* v. *Illinois*, 278 U. S. 367; 281 U. S. 179, 696; 311 U. S. 107; 340 U. S. 858; H. R. 3210, 83rd Cong. (1955); H. R. 2310 and S. 2550, 84th Cong. (1956); Marquette Law Review Vol. 30, Dec. 1946, Feb. 1947, May 1947.

(e) The parties complainant in the above entitled Original Causes should be afforded an opportunity to present evidence, if evidence is necessary, to show that any change in the decree of April 21, 1930, which would permit a greater diversion of waters from the Great Lakes-St. Lawrence system than is specified therein, will affect the natural level or flow of boundary waters to the prejudice and detriment of not only the complainants but also the United States and Canada, the people of the respective countries, the investors in the bonds of the New York Power Authority, the future consumers of the electrical power generated from the waters of the Niagara and St. Lawrence Rivers and the users of the navigation facilities of both countries.

WHEREFORE, the State of Michigan, joining the State of New York, respectfully moves this Court for an order dismissing the motion of the Metropolitan Sanitary District of Greater Chicago (formerly the Sanitary District of Chicago) for clarification of the decree of April 21, 1930, or, in the alternative, for an order appointing a Special Master and referring to him for hearing and report the issues raised by the motion of the Metropolitan Sanitary District of Greater Chicago, with leave to the State of Michigan otherwise to oppose the motion of the Metropolitan

Sanitary District of Greater Chicago by answer and brief and by the production of oral and documentary evidence.

Dated: December 7, 1956.

Respectfully submitted,

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